No. 11820.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TAVARES CONSTRUCTION COMPANY, INC., a corporation, CONCRETE SHIP CONSTRUCTORS, a joint venture, STROUD-SEABROOK, a copartnership, LLOYD S. STROUD, R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES, HENRY M. PAGE and DON F. GATES,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA,

Appellee and Cross-Appellant.

REPLY BRIEF OF APPELLANTS.

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Exceptions to Appellee's Statement.

Appellants, Tavares Construction Company, Inc., *et al.,* point out the following errors in Appellee's Statement:

1. Appellee states (Br. 4) that the lease provided that either party could terminate the lease by giving notice that Tavares no longer needed substantial use of the yard for construction of boats for the United States. This statement is not quite correct and is misleading. The lease provided that at any time when substantial use by lessee of the yard was no longer required to construct boats for the Government, then either party could terminate the lease on ten days' notice [R. 55, 56]. Upon

such termination lessee had 90 days to exercise an option to purchase [R. 58], and upon the expiration of the option period lessee was to surrender possession [R. 61]. Thus Appellants had the right of possession for 100 days after service of a notice of termination.

2. Appellee states (Br. 4) that Tavares could not sublease or assign its rights without permission. This statement leaves out the important part thereof which was that Tavares could not sell its rights without prior consent of Defense Corporation and approval of Maritime Commission [R. 64]. The word "sell" used in the lease was of great significance to the jury when considered in the light of Government counsel's argument to the jury and the Court's instructions.

3. Appellee states (Br. 5) that there were three ship contracts. There were five ship contracts [R. 717], a Master Ship Repair Contract with the Army, and a Master Ship Repair Contract with the Navy [R. 848].

4. Appellee states (Br. 7): "The Court stated that Appellants would not be allowed to show what they could have recovered in a suit for breach in the Court of Claims, but that the case would be submitted to the jury on the theory that the jury should fix just compensation." The latter part of this statement omits the qualifying language of the Court that "in so far as it can," the Court would permit the jury to find just compensation [R. 701].

5. Appellee states (Br. 7): "In connection with offers in evidence of portions of the pre-trial stipulation and agreed statement of facts, the Court stated that, in valuing the option, occurrences and agreements between the parties subsequent to December 23, 1944, should be

excluded from consideration as irrelevant. So far as they might afford basis for recovery for breach or frustration, the Court indicated that they could only be litigated in the Court of Claims." This statement is incorrect. A correct statement would be:

> In connection with the position taken by the Government in determining the value of the leasehold, that it was entitled to show what it would have cost lessee for insurance, taxes, etc., after December 23, 1944, if the lease had not been condemned, the Court stated that the law of the case had been established as to the right to compensation for the leasehold, that the option was the only complex situation, that when it comes to the question of value of the option the case can be simplified by the optionee preserving in the Court of Claims anything subsequent to the date of termination, that anything that comes within the period up to December 23, 1944, is relevant, that anything that occurred subsequent to December 23, 1944, is not relevant, and indicated that any claim for frustration, breaches, and so forth could only be litigated in the Court of Claims [R. 724-725].

Since the option could not be exercised until the expiration of the lease or the termination thereof, and there had been no termination, this deadline was adopted by the Court to exclude the option from this case and preserve it for suit in the Court of Claims as the Court considered the taking on December 23, 1944, to have frustrated Appellants' right to have the option come into being.

6. Appellee states (Br. 8): "Mr. Mueller testified that the option was worth $500,000 and the lease itself was worthless [R. 881, 901.]" This is incorrect. Mr.

Mueller testified that the lease was worth $500,000 [R. 881]. He did not testify as to any added value for the option [R. 907-922]. On cross-examination he said the land had increased in value $387,899 between the date of taking from the owners and the date of taking from Appellants [R. 922]. He did not say the lease was worthless. He said he did not include in his valuation of $500,000 for the lease, any bonus for the National City lease to Tavares on the 18 acres [Exhibit 5] which Tavares had assigned to Defense Corporation [R. 900 to 907]. Thus the witness was talking about a different lease than the one to which Appellee ascribes the statement.

7. Appellee states (Br. 7): "Each of the witnesses stated that he included the option in valuing Appellants' contract rights." This statement is misleading. Appellants' appraisers expressed only their opinions as to the value of the leasehold estate. While each stated he had taken into consideration the option provision as well as all other provisions of the lease in arriving at his opinion, none of them added anything to their valuation of the leasehold for the option, although their testimony shows that the option had an added value [R. 810-827, 832-865, 869-879, 881-922]. The option, besides having a value as such, was also a protective provision for the leasehold estate, in that it would either prevent the Government from terminating or give the lessee the right to purchase in the event of termination and thereby preserve the leasehold benefits. This is the consideration that Appellants' appraisers gave to the option. This does not mean that they included the value of the option as such in valuing the leasehold. Actually the option had a value in itself in excess of the leasehold. The facilities and machinery

alone were worth $500,000 more than the option price [R. 747]. The land was worth $387,899 more than the option price [R. 922]. Thus we have a value of $887,899 for the option alone.

Actually the option prevented the Government from terminating, otherwise it would have done so instead of condemning. The Government knew that Appellants considered the option valuable [R. 770].

Pursuant to the Court's rulings, Appellants were confined to market value of the leasehold and were not permitted to prove the amount of damages that they had suffered by reason of the condemnation having frustrated their option rights [R. 701, 725, 1432, 1438, 1442].

8. Appellee states (Br. 8): "Mr. Anewalt justified his appraisal by stating that Appellants' profits had amounted to $1,000,000 a year [R. 851]." This is incorrect. The $1,000,000 a year referred to was the rent that Appellants had paid Defense Corporation under the lease [R. 842, 851]. The witness was asked whether Appellants could pay a rent of 10 cents per man hour on 7,000,000 man hours per year or $700,000, and the witness said they could because they had paid $1,000,000 a year under the lease when they were building boats [R. 851]. Actually the figure of $1,000,000 per year profits is substantially in error, but there is nothing in the record as to what appellants' profits were.

9. Appellee states (Br. 8) that its objection that a purchase option was not such an interest in the property as to be compensable in eminent domain was consistently overruled on the ground that the Court would not deviate from the pre-trial ruling that the option was taken and compensable in this proceeding. This is incorrect. The

objection was overruled because it was not pertinent to the questions to which it was directed. Mr. Tavares and Mr. Seabrook were each asked as to the value of the facilities and machinery [R. 746, 780]. The four appraisers for Appellants were each asked as to the value of the leasehold estate [R. 802, 831, 869, 880]. The pre-trial order does not state that the option was compensable in this proceeding. It states that Appellants have a compensable interest in the property [R. 310]. They had this by reason of the leasehold estate, regardless of the option. The trial court interpreted the pre-trial ruling as holding that only the leasehold estate was compensable in this proceeding [R. 724-725, 1432, 1437, 1438, 1440, 1442].

10. Appellee states (Br. 8) that Appellants initiated the practice of having the witnesses as to values explain what they understood the rights under the lease to be. This practice was initiated by Appellee in its cross-examination of Mr. Tavares [R. 751, 757, 761-765, 771-774].

11. Appellee states (Br. 11) that at the hearing on motion for new trial the Court pointed out that "the Court had felt bound to follow and had followed Judge Yankwich's pre-trial ruling that the option was compensable, but that did not mean that it was to be compensated for if the jury found that it had no value [R. 1395-1398]." This is incorrect. The Court pointed out that while Judge Yankwich's ruling said that Tavares had a compensable interest, that that did not mean that the Court had to tell the jury that they must find that there is some compensation due the Tavares interests [R. 1395-1398].

Summary of Argument.

The Court ruled on pre-trial that the lease and option had been taken and that Appellants had a compensable interest in the property. The trial court did not interpret this to mean that the option was compensable in this proceeding, ruled that the question as to the value of the option could only be determined in the Court of Claims, and limited the proof to the market value of the leasehold estate. Pursuant to this ruling, Appellants limited their proof to market value of the leasehold estate. The jury were instructed that their award to Appellants, if any, was to be the market value of the leasehold estate. The option was considered only to the extent it provided protection against termination of the leasehold estate. The value of the option has neither been tried nor determined in this proceeding.

The State Rules of Procedure apply and not the Federal Rules, and the case was tried on that theory. The Appellate Court has the privilege and duty to notice error, even in the absence of objection or exception, to prevent an injustice.

Appellee contended during the trial and in its argument that the lease could not be sold because of the provision against alienation and that consent to sell had not and could not be obtained, and the Court instructed the jury to determine this question.

The offer of compromise was not used for impeachment purposes but as an admission as to the value of the leasehold estate and to infer that Appellants had already been compensated.

The Appellee's argument to the jury was so prejudicial that it is the power and duty of this Appellate Court to correct the error.

Both the Appellee and the Court told the jury that they were to determine the interest of Appellants under the lease instead of telling them what that interest was and leaving to the jury only the determination of the value of that interest.

An opinion as to value, based upon an erroneous premise, is not evidence. To hold that it is evidence would involve the assumption that the opinion would be the same if based upon a correct premise. Appellee's contention that the verdict is supported by the evidence is based upon assumed evidence and not upon evidence.

Appellants had a minimum of 100 days' right of possession even if the lease were terminated. No one can deny that 100 days' possession of a $3,000,000 complete shipyard is of substantial value.

The award is so grossly inadequate as to shock the conscience of this Court. The trial has resulted in a miscarriage of justice. Actually the jury did not determine the amount of just compensation but only determined that prior consent had not been obtained to make a sale of the lease and that therefore no sale could be made under the terms of the lease.

The trial court corrected the judgment to eliminate the disparity between the issues tried and the judgment. The Court did not change its mind. The best evidence of what was in the Court's mind during the trial is the Court's own statement with reference thereto made at the time the judgment was corrected.

ARGUMENT.

All of the points argued by Appellants have been preserved for review by this Court, as will be more fully pointed out under each point. In addition it was stipulated that all adverse rulings should be deemed excepted to [R. 462-463].

I.

The Issue of Just Compensation for Appellants' Purchase Option Has Not Been Tried and Determined in This Proceeding.

Appellee says that the case was tried on the theory that the option rights were taken and compensable in this action, that the witnesses testified as to the value of the option over Appellee's objection that they were not compensable in this action, that the jury was instructed to include in their verdict compensation for the option and that such compensation was included (Br. 14-17).

In support of this contention, Appellee misstates the evidence, picks out isolated statements from the record and attributes to them meanings wholly contrary to the true meaning thereof when read in the light of the entire record, and misconstrues the rulings and instructions of the Court.

This was a complex case, involving questions of law as to which there is no precedent. This action was instituted to acquire land for the use of Appellants [R. 20]. Over two years later the Supplemental Complaint was filed [R. 249], which was indefinite as to just what was intended thereby. Appellants filed a motion for a more definite statement [R. 259]. Appellee filed a Bill of Particulars [R. 266] which still left it uncertain as to the extent of the taking. Appellants answered alleging

their interpretation that their rights had not been taken [R. 272]. Appellee was likewise in doubt as to the extent of the taking, as on September 3, 1946, or 20 months later, it served on Appellants a notice terminating the lease [R. 293], in response to which Appellants demanded information as to the amount of the option price [R. 296-298]. No reply was received, but in the meantime the parties jointly submitted the matter to the Court on pre-trial [R. 277-306] to determine. The Court on pre-trial ruled that Appellants' lease and option rights had been condemned and that Appellants had a compensable interest in the property taken [R. 310].

Appellants understood this ruling to mean that their option rights were compensable in this action and so contended at the trial [R. 698-700]. Appellee contended otherwise [R. 745]. The Court interpreted the ruling to mean that compensation for the leasehold only could be awarded in this action and that the matter of the option would have to be preserved for determination in the Court of Claims as the District Court was not the proper forum therefor [R. 724-727, 1432, 1437, 1438, 1442].

Appellants' theory is stated in the record at pages 698 to 700. Appellee's reference to Appellants' statement as to their theory [Br. 16, R. 725] to the effect that December 23, 1944, was a deadline and that they were limited to the market value of the leasehold estate was merely Appellants' statement of their understanding of the Court's prior ruling [R. 700-701].

Appellants have consistently maintained that since this was a condemnation by the Government of its own obligation, and the District Court having acquired jurisdiction, that the matter of compensation could not be tried piecemeal, that the entire matter should have been determined

in this proceeding, and that it was error for the Court to segregate the issues, try only the matter of compensation for the leasehold estate in this proceeding and attempt to preserve the matter of compensation for the option for determination by the Court of Claims.

Appellee has consistently contended until now, that Appellants' remedy was in the Court of Claims. Now after getting Appellants' evidence as to the compensation for the option excluded, and then after the Court had inadvertently signed a judgment (which Appellee prepared) which, by including the word "option" therein, would have deprived Appellants of their right to maintain an action therefor in the Court of Claims (but which judgment the Court corrected), Appellee now by misstating and twisting the facts, contends that the matter of compensation for the option was determined in this proceeding.

On page 15 of Appellee's Brief, the facts are again misstated. Appellants have pointed out these errors in paragraphs 6, 7 and 9 of their Exceptions to Appellee's Statement. These misstatements are used by Appellee as the basis for its argument that the compensation for the option was tried and determined in this case. We again point out that the only evidence that Appellants were permitted to introduce under the Court's ruling, and did introduce, was as to the market value of the leasehold estate [R. 802, 831, 869, 880]. The evidence as to the cost of the facilities and machinery [R. 692], the rental paid under the lease [R. 693], the value of a fee for the construction thereof [R. 741], the value of the facilities and machinery [R. 747, 781, 791], and the value of the land [R. 922] were all matters pertinent to the valuation of the leasehold

thereon and supporting the opinions of the witness as to the market value of the leasehold estate.

Not one of Appellants' witnesses was asked for his opinion as to the value of the option. True, each witness testified he took into consideration the option provision along with all of the other provisions of the lease in arriving at his opinion, but none of them added anything to their valuations of the leasehold estate or included anything therein because of the option as such. It is evident, however, that each of Appellants' witnesses considered the option to be worth more than the full unexpired term of the leasehold estate. There was much discussion with Appellants' witnesses on cross-examination with reference to the termination and priority provisions. It is clear that the consideration given by Appellants' witnesses to the option provision was limited to the protection given to the lessee thereby against a possible early termination of the leasehold estate.

In other words the option would act as a deterring factor against termination by the Government, but in the event of termination, the lessee could protect his rights through the exercise of the option. That the option had this effect is demonstrated by the very fact that the Government brought this condemnation action instead of merely serving a notice of termination or requesting priority. The Government knew that Appellants considered the option to be very valuable [R. 770, 784].

The Court in instructing the jury to take into consideration the option rights, meant no more than to consider

them to the extent that the witnesses had considered them, to wit: as a protection against termination of the leasehold estate. Certainly the jury could not, and did not, include a value for the option rights in the absence of any evidence upon which to base a value therefor. The Court did not instruct the jury to "include the value of the option in their award" as stated by Appellee (Br. 17). The Court instructed the jury to make their award the market value of the leasehold estate, that in arriving at such award they were to take into consideration the possessory rights, the right of the Government to prior use, the right to terminate and the option rights [R. 1294]. Thus the consideration which the jury was to give to the option rights was only in connection with the leasehold estate, *viz.:* the protection it gave against the priority and termination provisions. If priority were requested, Appellants would then no longer require the use of the facilities for constructing boats for the Government, and Appellants could elect to terminate and thereby bring the option provisions into operation.

As to Appellee's statement (Br. 16) that the ruling of the Court that Appellants would not be entitled to show what their recovery might have been in a Court of Claims suit, was correct, we wish to point out that the authorities cited by Appellee in support thereof in footnote 6 were not cases where the Government was condemning its own obligation. We submit a different rule should apply, and that the Government can not escape its contract obligations under the guise of condemnation. The Supreme Court has recognized that exceptions must be made to the ordi-

nary measure of compensation when the facts justify it. In the case of *United States v. General Motors,* 323 U. S. 373, where a temporary lease was condemned out of a long term lease, and the expense of the lessee moving out was more than the award for the temporary term taken, the Court in holding that evidence as to this expense should not have been excluded, said:

> "If such a result be sustained, we can see no limit to the utilization of such a device; and, if there is none, the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing just compensation in some such concept as the common law idea of a peppercorn in the law of seizin or the later of 'value received' in that of contractual consideration."

It was therefore error for the Court to exclude evidence as to any of the losses or damages which Appellants sustained which Appellants would have been entitled to prove in the Court of Claims had Appellee merely taken possession and refused to perform its obligations under the lease instead of accomplishing the same result by instituting this proceeding. The Government has the right to arbitrarily take private property, but it must pay just compensation. It likewise has the right to arbitrarily breach a contract, and specific performance can not be compelled, but it must pay just compensation. The measure should be the same in either case, otherwise the Government could escape its just obligations through the device of condemnation.

II.

The Trial Court Erred in Instructing the Jury.

Appellee contends (Br. 18) that Section 647 of the California Code of Civil Procedure which provides that giving an instruction, although no objection was made is deemed excepted to, is not applicable and cites as authority therefor decisions dealing with the General Conformity Act, 28 U. S. C. Sec. 724. The General Conformity Act was repealed by the Federal Rules of Civil Procedure. (*DeRosmo v. Feeney* (D. C. N. Y. 1941), 38 F. Supp. 834.) Rule 51 of the Federal Rules requires the Court to inform counsel as to the instructions before giving them and requires counsel to state their objections. But Rule 81(7) provides that the rules (excepting those relating to Appellate procedure) do not apply to condemnation proceedings. The trial court held that the rules did not apply. The Court said:

> "Before the argument, and although it is not required strictly, because this is not an action covered by the Rules of Civil Procedure, I propose to tell counsel exactly what the charge will be" [R. 1225].

Also see

> *Eagle Lake Improvement Co. v. U. S.* (C. C. A. 5, 1944), 141 F. (2d) 562, 563.

The case was therefore tried upon the theory that the California procedure applied. However (apparently due to the shortness of time caused by the necessity of Government counsel leaving for another trial in the East), the Court did not tell counsel what the charge would be so as to give them an opportunity to study the instructions and intelligently make their objections as contemplated by Rule 51 [R. 1372]. If Appellee's contention is correct,

then it was error for the Court not to have informed counsel as to the instructions which the Court proposed to give to the jury.

The instructions were adverse to Appellants and were therefore deemed excepted to pursuant to the stipulation [R. 462-463].

In any event the instructions complained of were of such plain error that the Appellate Court is not only privileged, but is under a duty, to correct that error notwithstanding the fact that no specific exception was taken to those instructions below. The Appellate Court, as a Court of the United States should insure that the Appellants were not prejudiced by some plain error which redounded to the benefit of the United States and thereby thwart the mandate of the Constitutional Guaranty of the Fifth Amendment. That this Appellate Court has that privilege is shown by the following decisions:

In *United States of America v. Atkinson,* 297 U. S. 157, 160, 80 L. Ed. 555 (1936), the Court said:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."

In *Ayers v. United States* (C. C. A. 8, 1932), 58 F. (2d) 607, 609, the Court said:

> "Notwithstanding this rule (the rule that an error can be assigned upon appeal only if an exception was taken thereto in the trial court), this court, in order to prevent an injustice, may notice a plain error even in a civil case. *United States v. Tennessee & Coosa R. Co.*, 176 U. S. 242, 256, 20 S. Ct. 370, 44 L. Ed.

452; *Baltimore & O. R. Co. v. McCune* (C. C. A. 3), 174 F. 991, 992; *Ratetsky v. Gramm-Bernstein Motor Truck Co.* (C. C. A. 8), 4 F. 2d 965, 968; *New York Life Insurance Co. v. Rankin* (C. C. A. 8), 162 F. 103, 108."

In *Helvering v. Rubinstein* (C. C. A. 8, 1942), 124 F. (2d) 969 at page 972, the Court said:

"To prevent a plain injustice, an appellate court may notice obvious errors in either criminal or civil cases, even though not properly called to the attention of the trial court or saved for review. *Ayers v. United States,* 8 Cir., 58 F. 2d 607, 609, and cases cited. But this right to disregard the rule that an appellate court will not ordinarily consider issues of law or fact not raised below, is a right to prevent a clear miscarriage of justice apparent from the record, and not a right to afford a defeated litigant another day in court because he thinks that if he were given the opportunity to try his case again upon a different theory he might prevail."

In *Wiborg v. United States,* 163 U. S. 632, 658, 41 L. Ed. 289 (1896), the Court said:

". . . although this question was not properly raised, yet if plain error was committed in a manner so absolutely vital to defendants, we feel ourselves at liberty to correct it."

In *Clyatt v. United States,* 197 U. S. 207, 221, 49 L. Ed. 726 (1905), the Court said:

"While no motion or request was made that the jury be instructed to find for defendant, and although such a motion is the proper method of presenting the question whether there is evidence to sustain the verdict, yet *Wiborg v. United States,* 163 U. S. 632, 658,

justifies us in examining the question in case a plain error has been committed in a matter so vital to the defendant."

That it is the duty of this Appellate Court to correct this error is found in the Constitutional Guaranty of the Fifth Amendment.

Appellee's interpretation (Br. 19-20) of the Court's instructions: "If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc., will be zero" [R. 1295-1296], is one which a so-called "Philadelphia Lawyer" might possibly be expected to ferret out after a lengthy study thereof and the application of legal implications. Certainly no layman juror could or would ever make such an interpretation. In any event, Appellee's interpretation is erroneous.

Appellee concedes in its brief (Br. 19) that it would have been error for the trial court to charge that if Appellants' interest in the property was not transferable then no compensation should be allowed for it. Appellee then argues, however, that the trial court made no such charge. Appellee contends that the charge "plainly deals only with the question of how much an assumed buyer would have paid" (Br. 20). In attempting to support this argument, Appellee points out that the Court instructed the jury to proceed in the same manner as they proceeded as to the market value of the land. Appellee then points out that the National City lands were inalienable, and goes back ten pages of printed record to find the instruction to disregard any agreements between the State and the City limiting the uses, and says this means alienation. We submit that an agreement "limiting the uses" does not prohibit "alienation." There was a restriction upon the City's use as well as alienation [R. 1208-1211]. There was a re-

striction upon Appellants' use as well as alienation [R. 63]. We submit that a jury instruction is not designed to be a mental exercise nor a problem in logic, but is meant to point out to the jurors the exact manner in which they are to proceed in arriving at a verdict, and, if it fails to do so, it must fall.

However, assuming that the jurors were supposed to go through this mental process, and that it was humanly possible for them to have done so, we submit that the reference was to the limitation on the uses and had nothing to do with alienation. A limitation of the use of property is quite a different matter than a prohibition against alienation.

Furthermore, when the jury came back and asked to have the Tavares instructions read again, the Court did not go back and read this portion of the instructions as to the land [R. 1300-1303].

After instructing the jury to proceed in the same manner as they proceeded as to the market value of the land, the Court explained what it meant thereby, to wit: "the question being, what could it have been sold for on the open market for cash on December 23, 1944, the date it was taken or cancelled by this proceeding, or shortly thereafter above what Tavares Construction Company, Inc., would have to have paid under all its terms and conditions" [R. 1295]. This is merely the ordinary rule for determining the bonus value of a leasehold estate. It means the difference between the value of the use and the rent that must be paid for the use. However, the use of the word "canceled" was erroneous and misleading to the jury. Appellee's witness Mr. Mason had given as one of his reasons for his valuation of nothing, that the lease had been canceled by this condemnation action [R. 1180,

1200-1201]. The lease was not canceled, it was acquired. Had it been canceled, it would then of course have had no value.

Following this, the Court instructed the jury to determine a question of law, *viz.:* whether or not Appellants could sell [R. 1295]. Such instruction was wholly unnecessary if all the Court was doing was telling the jury how to arrive at the amount an assumed buyer would have paid as Appellee contends (Br. 20). The Court told the jury if they found that it could have been sold, then they should determine the amount, but if they found it could not have been sold, then their verdict should be zero [R. 1295-1296].

Appellee states that the lease "provided that it could not be transferred without the consent of Defense Plant Corporation and the Maritime Commission" (Br. 19). Appellee carefully omits the important word "sell" contained in the lease provision [R. 64]. Appellee likewise overlooks the position its counsel took during the trial [R. 774] and in his argument to the jury [R. 1262] that this provision prohibited a sale. In his argument he read this provision to the jury and told them that Tavares would not get five cents for the lease without this consent to a sale [R. 1262]. Furthermore the lease says "prior" consent and there was no evidence that such consent had been given.

The instructions should be interpreted in the light of the facts and circumstances of what occurred at the trial and in the manner in which it is evident the jury must have understood them. Certainly the purpose of instructions is to give the law to the jury in plain simple language so that it will understand it, and the important thing is how a jury understands an instruction and not how a lawyer may be able to interpret it.

Appellee denies (Br. 21) that it sought to prove that Appellants' rights were inalienable. It certainly attempted to (and we sincerely believe did) convince the jury of that fact. Appellee's counsel made the following statement in his cross-examination of Mr. Tavares:

> "Q. How could it be sold? How could you sell it to a willing buyer with a clause in there providing that you couldn't unless you got the consent of the Defense Corporation and the Maritime Commission?" [R. 774.]

Appellee's counsel made the following statement in his argument to the jury:

> "Here is the thing that Mr. Hindes said was such that he never would even signed this lease in the first place."
>
> * * * * * * * *
>
> "Twenty-four: Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease.
>
> Mr. Willing Buyer, I want to sell you this lease, I want to assign it. I want to sublet a part of it to you. What will you give me?
>
> 'Why, Mr. Tavares, you can't do that without you get the consent of the Defense Plant Corporation and the Maritime Commission. I wouldn't give you five cents for it. How do you know, that they are going to let you make a profit on this paper? Is it reasonable to suppose after they put up for you $2,700,000 and build you a shipyard, that they will permit you to

go ahead and sell this paper? Do you not know that on the date of this lease it is indicated that the Navy of the United States proposes to take over those utilities?'

Mr. Tavares told me that he thought that he could get the consent of the Defense Plant Corporation and the Maritime Commission for him to make another half million dollars" [R. 1262].

Thus Appellee told the jury that the lease could not be sold because the consent could not be obtained for Appellants to make a profit on the lease, instead of telling the jury that they should assume that the consent had been given.

Lastly, the Court instructed the jury that if they found it could not have been sold, then their verdict will be zero [R. 1295-1296]. This clearly meant to the jury that if they found that the lease could not have been sold, that then they did not need to determine the value thereof, but should indicate such finding by rendering a verdict of zero. That this was the clear implication of the instruction is supported by the prior instruction to the effect that if they found that no purchaser would have purchased except for a nominal consideration, then their verdict must be in a nominal figure only [R. 1293].

In other words the instructions conveyed to the jury that they were to determine two questions as to Appellants: First, whether or not the lease could be sold under its terms. If it could not, their verdict was to be zero. If it could, then they were to determine the second ques-

tion of how much. This was to be the market value of the leasehold estate. If they found that the interest of Appellants under the lease was so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration, then their verdict was to be in a nominal figure only [R. 1293]. Even this instruction was erroneous in that it required the jury to determine a question of law, to wit, whether the "interest" of Appellants was speculative or conjectural, instead of whether the "value" of Appellants' interest was speculative or conjectural. There was no speculation or conjecture as to whether Appellants had an interest.

The jury, after deliberating for some time, requested the Court to read the instructions as to Appellants to them again. Evidently the jury was not having difficulty on the question of values, else they would have also requested the instructions as to the land owners read to them again. Evidently the thing that was bothering them was this other question which the Court had asked them to determine as to Appellants (whether or not a sale could be made) that they wanted to be sure about. The instructions as to Appellants were read again [R. 1300-1303]. The last one, to wit, "If you find it could not have been sold, then your verdict * * * will be zero" [R. 1303], is plain and simple and the one which must have remained foremost in their minds when they again retired to the jury room at 6:20 o'clock P. M. [R. 1303]. They returned with their verdict at 6:40 o'clock P. M. [R. 1304]. The Court had made it simple for them and it didn't take

them long. They evidently looked through the lease, read the provision that prohibited a sale without prior consent, found that there was no evidence that such consent had been given, concluded therefore that the lease could not be sold, and obeyed what they understood the Court had instructed them to do in such event, by rendering a verdict of zero.

This conclusion is further supported by the fact that the jury believed the National City appraisers 100 per cent in its award to National City. The same appraisers testified for Appellants. It is unbelievable that the jury gave such full faith and credit to the testimony of these witnesses as to National City, but so fully discredited their testimony as to Appellants. Something else happened, or they would have brought in a verdict for something for Appellants. They rendered their verdict of zero, not as to value, but because they believed they had to under the Court's instructions and the prohibition in the lease against selling without prior consent, which Appellants had failed to prove they had obtained.

With reference to Appellants' point made in their Opening Brief, pages 29 to 36, that market value was not the proper measure of compensation when there was no market, we call the Court's attention to *United States v. Savannah Shipyards* (C. C. A. 5, 1944), 139 F. (2d) 953, 140 F. (2d) 863, involving the condemnation of a shipyard then in the process of being constructed, where there had been no sales of such and evidence as to the costs of construction was held proper.

III.

The Offer of Compromise Was Not Used for Impeachment Purposes.

The offer of compromise [Exhibit 3, R. 770] was written after the facilities had been constructed and the contingencies involved in guaranteeing the cost had been eliminated. It was a minimum fee based upon no risk involved. It was not the same minimum fee that would have been fair at the time the agreement was made. The 10 per cent fee was for a guaranteed cost [R. 741].

Assuming, but not admitting, that the offer of compromise would have been admissible for impeachment purposes if the issue in this case had been the amount of a fair supervisory fee, it was not used for that purpose. The question as to what was a fair fee was not in issue, as the Court excluded that issue as being proper only in a Court of Claims action [R. 701-702]. Appellee concedes this (Br. 16). Therefore, it was wholly immaterial for impeachment purposes.

The only use which Appellee made of this offer of compromise was in its argument to the jury. That portion thereof which refers to a fee was used by Appellee's counsel as an admission as to the market value of the leasehold estate. Counsel for Appellee said to the jury with reference thereto:

> "Ladies and gentlemen, you are not going to give them more than they asked for, are you, before this lawsuit was brought? And don't forget, that that was only their asking price then" [R. 1265].
>
> "Ladies and gentlemen, on the 24th day of November, 1944, they say, 'We want you to give us $80,000 for supervising the putting in of the things you

bought for us to make ships with to sell to you. We want you to give us $80,000.'

You will have these papers. If that isn't right—if what I have read to you isn't right, throw me out of the window. But, my goodness, are you going to permit those people to go into the treasury of the United States, when we come in here in a condemnation case, and get any more?

Well, if you think they are entitled to that, you give it to them. But if you think that it would be right for me to say to you, 'I want you to spend $2,700,000 to build me a shipyard to build concrete ships to sell to you at a profit, and then after it is all through and done, I want you to give me $80,000 for building my own shipyard, and supervising that, and then on top of that I have taken the expenses, I have taken the vacations of my own office force'" [R. 1267].

The $80,000 fee mentioned in Exhibit 3 was only a part of the consideration which Appellants were asking. There were two other items of consideration [R. 770]. Appellants considered the three items to be worth six or seven hundred thousand dollars [R. 784].

At no time did Appellee's counsel state that it was offered for impeachment purposes as to the amount of a fee. If it was proper to be admitted for that purpose, its admission should have been so limited and counsel should have confined his argument to that. Actually counsel made no argument as to impeachment, but extensively commented on the exhibit as going to the issue of market value of the leasehold. This was very prejudicial. He even inferred to the jury that Appellants had already been compensated for the taking.

IV.

There Was Prejudicial Error in the Government's Argument to the Jury.

Appellee says this ground for reversal has not been preserved because Appellants made no objection thereto at the time, and cites the general rule set forth in *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 239. An examination of this case reveals that there are exceptions to such rule, dependent upon the facts in the particular case. Apparently it is a matter of degree. If there ever was a cause in which the exception to the rule should be applied, it is this one. The statements were so flagrant and prejudicial that they were incurable. The only reason for objection is to give the Court a chance to cure the prejudicial effect thereof by admonishing the jury to disregard the statements. These statements were such that admonishment would have served no purpose. The damage had been done. To have said anything to the jury, would have only emphasized the prejudicial effect thereof instead of obliterating it. Government counsel must have known they would prejudice the jury. He must have made them with that intent. There was no other reason for making them. This did appeal to the passion and prejudice of the jury. In fact the entire record indicates a studied effort on the part of Government counsel to confuse and prejudice the jury. Appellee's twisted and misstatements of the facts in its Brief indicate a studied effort to now confuse this Appellate Court.

There is ample authority for this Appellate Court to grant a reversal on the impropriety of an argument notwithstanding that no objection was made or exception taken in the trial court.

For example, in *New York Central Railroad Company v. Johnson,* 279 U. S. 310, 318, 73 L. Ed. 707 (1929), counsel for the prevailing party in the trial below made an argument to the jury which was designed to appeal to their passion and prejudice, but counsel for the opposing party did not take exception to that argument as required by statute. The Supreme Court, however, on appeal said:

> "Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy . . . of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. (Cases cited.) Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this Court from correcting the error."

The statements complained of in particular are set forth in Appellants' Opening Brief on pages 52 and 53, and will not here be repeated. They picture Appellants as war profiteers, assert they made profits with no investment of their own, infer they had already been compensated, and that they now want more of the public's money for nothing. The statements were not based on facts. We do not deny that Appellants made a profit, but certainly

this Court knows that the statutes on profit limitations on shipbuilding and the renegotiation law took care of any excessive profits. Appellants did make substantial investments of their own and did take substantial risks, but such facts as well as the matter of profits were wholly irrelevant and immaterial to the issue in this case and no evidence was offered in regard thereto.

Counsel's statements should be considered in the light of the times. The country had just emerged from the worst war of all times, with the greatest debt, and talk about war profiteers was common gossip. This jury wasn't going to be a party to any such thing even though the Court had told them that they were not to consider such things in arriving at their verdict. They must have been considered, and would have been considered, regardless of any admonition of the Court. If Appellee's contention be correct that the jury did not render their verdict of zero because Appellants were prohibited from selling, then they must have rendered it because they thought Appellants had already gotten enough out of the war and that they weren't going to be a party to giving them any more regardless of Appellants' legal right thereto. That this did prejudice the jury is evidenced by the amount of the verdict as to National City, as to which no such remarks were made and the jury knew the City was not a war profiteer.

Appellee now attempts to mitigate the prejudicial effect of these statements (Br. 25) by indicating how they might have been applied to other matters. Such other matters were not the issue before the jury, and besides Government counsel actually applied his prejudicial statements to the very matter which the jury were called upon to decide, to wit, the amount of the award for Appellants.

V.

The Trial Court Erred in Failing to Instruct the Jury as to the Legal Effect of Appellants' Lease.

Appellee says that Appellants were the first to introduce testimony as to the legal effect of the lease. The record proves that this practice was initiated by Appellee [R. 751, 757, 761-765, 771-774]. We submit that this was a part of the design of Appellee's counsel to confuse the jury. That it did confuse the jury is proved by their verdict.

We agree with Appellee (Br. 26) that the true legal construction of the lease was not an issue in the case. But throughout the trial and the argument, Appellee made it an issue in the case. Even the Court by its instructions made it an issue in the case. (See Reply to Point II, *supra.*) How was this jury to know what the issues were other than what they gathered from the questions to the witnesses, the argument of counsel, and the instructions of the Court? They were not supposed to know the law. That Appellee put the legal construction of the lease in issue is conclusively shown by the following statements made by Appellee's counsel in his argument to the jury:

> "Every claim that it has in this lawsuit stems from Exhibit W. I say to you that, in reading that document, if you can tell me what it means, then you are probably a better man than I am. I tell you that, if the lawyers can agree on what that document means, they are better lawyers than I am. *So, therefore, their rights stemming from Plancor 407 are what you are to determine.*" (Italics ours.) [R. 1256.]

He then went through the various paragraphs of the lease and gave interpretations thereof that were clearly erroneous [R. 1257-1263], and we give credit to the legal ability of Appellee's counsel by stating that he must have known that they were erroneous.

Then the Court (due unquestionably to the shortness of time because of the necessity of Government counsel leaving for Michigan for another trial [R. 1227]), instead of advising counsel as to what the charge would be [R. 1372] as the Court had previously indicated it would do [R. 1225], proceeded to so instruct the jury that the question as to the legal construction of the lease was left to the jury to determine (Point II, *supra*), instead of the Court telling the jury the proper legal construction of the lease. So far as the jury knew, the legal construction given them by Government counsel was correct, as the Court didn't tell them otherwise, but in effect, by its instructions left it to the jury to determine whether or not Appellants' interest was speculative or conjectural [R. 1293], and whether or not Appellants were prohibited from making a sale [R. 1295-1296, 1303], just as Government counsel had argued [R. 774, 1256-1263]. The Court told them to consider the entire instrument [R. 1295] which certainly meant to a laymen jury that they were to read the lease and if they found any provision therein that prevented a sale and they found that prior consent to a sale had not been obtained, that their verdict must be zero. Paragraph Twenty-four [R. 64] provided that the lease could not be sold without the prior consent of lessor and the evidence was that such consent had not been given [R. 774].

VI.

The Verdict and Judgment Are Not Supported by the Evidence.

While Appellants urge in their Opening Brief that the appropriate measure of compensation is the difference between the value of the site, facilities and machinery, and the option price, this measure is applicable only if the option rights are to be compensated for in this proceeding. It would be the minimum amount assuming that Appellants had terminated the leasehold estate on December 23, 1944, and immediately exercised their option, thus waiving all benefits of the leasehold estate. If the option rights are to be preserved for compensation through action in the Court of Claims and compensation for the leasehold estate only is to be determined in this action, then compensation should be measured by the value of the leasehold estate. Argument under this point is confined to the verdict and judgment that the just compensation for Appellants' leasehold estate is nothing.

Appellee argues (Br. 27) that the judgment of nothing is supported by the opinions of its two appraisers, Mr. Shattuck and Mr. Mason. Certainly the opinion of an expert witness as to value, when based upon erroneous premises, is not evidence which will support a verdict or judgment. This is not merely a question of weighing the evidence. To say that it is, is to assume that the opinion would be the same if based upon a correct premise. This would be assuming evidence that is not in the record. A verdict or judgment based upon assumed evidence is not supported by any evidence.

Appellee's two appraisers were well coached. While they admitted time and time again that they did not consider certain features of the lease, and gave reasons for their opinions based upon their erroneous interpretations of the lease, they were well trained to always come up with the same stock answer of zero valuation regardless of the facts or interpretation of the lease [R. 1091-1160, 1161-1206].

The opinions of Appellee's two witnesses should be wholly disregarded. There is at least one important item of value which they wholly overlooked. That is the 100 days minimum right of possession which Appellants had even assuming that the Government had served a ten-day notice of termination on December 23, 1944, instead of filing this action. Appellants unquestionably had that ten days plus the entire 90-day option period that would follow such termination during which they could remain in possession [R. 54-55, 58, 61]. If the Government requested priority, the same result could have been accomplished by Appellants serving a termination notice.

Appellants were in possession, engaged in building and repairing boats for the Government, rent free, of a $3,000,000 complete shipyard, comprising 100 acres of land, with ship basins, buildings, shops, machinery, trucks, cranes, and equipment. The facilities had been designed for post-war uses as well as war [R. 735-737]. They could use the yard for private purposes by the payment of 10 cents per man hour rent, which was voluntarily offered by Appellants [R. 848]. It amounted to less than

10 per cent of the labor cost. This is very low for land, facilities and equipment. Under such arrangement, these charges did not go on whether there was business or not, but varied with the amount of business done, which is very desirable. Such arrangement must have been profitable to Appellants, otherwise they would not have offered it. They had no property taxes to pay as title was in the Government. They could underbid competitors for Government work who had to pay rent or had a large fixed property investment, which gave them assurance of getting Government work as long as there was any. On December 23, 1944, we were in the "Battle of the Bulge" in Belgium. The outcome of the war looked anything but good for the United States. Everyone expected the war to last a long time. If it did there would be need for more ships. Whether it was to be of long or short duration, there would be need for ship repairs, dismantling, etc., for a long time. Appellants were actually in an enviable position from the standpoint of anyone interested in such business. But the Navy needed this property for its own use. Perhaps the need was determined because the Navy believed the war would last a long time.

This right of possession for a minimum of 100 days was worth something, not nothing. In fact, it had a very substantial value. Even if we just take the ten automobiles and trucks listed in Exhibit Q [R. 1328-1330] we would have a substantial rental value, let alone the other millions of dollars' worth of land, facilities and machinery. To uphold this judgment merely because two real estate men said in their opinions the lease had no value, would be a travesty on justice. This Court knows of its own knowledge that the award is grossly inadequate. We submit that there has been a miscarriage of justice.

VII.

The Verdict and Judgment Are Contrary to Law.

Here again Appellee erroneously interprets (Br. 28) the Court's instructions. The Court instructed the jury to award nominal damages for Appellants' leasehold if it could have been sold for a nominal sum only, but to return a verdict of zero if the leasehold could not be sold [R. 1293, 1295-1296]. The former, not the latter, instruction referred to an inability to sell because of a lack of value. The latter referred to the prohibition against selling at all. Possibly the trial court did not so intend it to mean that, but that is what it does mean and certainly the jury so understood it. By awarding Appellants nothing, the jury simply found that no sale could legally be made, not that the leasehold had no value. The jury could not have found that the leasehold had no value. It did have a value and a substantial value, which can not be truthfully denied by anyone, even if confined to the minimum of 100 days possessory use referred to in Point VI, *supra.*

If the jury had found that the leasehold had no value, not because it could not have been sold, but because it had no value to anyone, not even to Appellants, then under the Court's instructions they would have brought in a verdict for a nominal amount.

The question as to whether or not the lease could be sold, was erroneously left to the jury, regardless as to whether the question related to the right to sell or the ability to find a purchaser. The law presumes in a condemnation case both the right to sell and that there is a

purchaser ready, willing and able to buy. The only question to be determined is how much.

If zero is an amount, then it is so grossly inadequate as to shock the conscience of this Court. The very doctrine of just compensation has been thrown to the winds by this judgment. We have found no case where there was something taken that something has not been awarded. The case of *Marion etc. Ry. v. United States,* 270 U. S. 280, 282, cited by Appellee as supporting a judgment of nothing is not in point. In that case the President under his war powers issued a proclamation taking over the railroads, but there was no actual possession taken and the railroad continued under its own management the same as before. The plaintiff claimed a technical taking and that therefore it was entitled to compensation. But the Court held that nothing had been taken from the plaintiff and that therefore nothing was recoverable. In the case at bar, there is no question but what Appellants' leasehold and option rights were taken. These rights were of substantial value, at least to Appellants, and it must be assumed that if they were valuable to Appellants that they would be valuable to a purchaser.

The measure of compensation in a condemnation case is the loss to the property owner. *United States v. Miller,* 317 U. S. 369. There can be no question but what the taking of this lease resulted in a monetary loss to the Appellants. The Court said in *United States v. Petty Motor Co.,* 327 U. S. 372, 378:

"If any property is taken, compensation is required." Appellants are entitled to have the amount thereof determined in this action, be it substantial or nominal.

VIII.

The Trial Court Did Not Err in Correcting the Judgment to Conform to What the Court Had in Mind Throughout the Trial and in Entering the Judgment.

The trial court at no time ever ruled, as stated by Appellee (Br. 29), that the option was compensable in this proceeding. On the contrary the Court at all times ruled just the opposite. It is clear from the record that the trial court considered throughout the trial that it was without power in this proceeding to award compensation for the option, that the Court did not permit the introduction of evidence as to the value of the option, that Appellants were confined to the market value of the leasehold estate, that the issue as to the value of the option was never submitted to the jury, and that the Court through inadvertence signed the judgment with the word option in it [R. 700-701, 724-727, 1294, 1431-1432, 1435, 1437, 1438, 1440, 1442].

Certainly the best evidence as to what the Court had in mind is the Court's own statements made at the time he corrected the judgment. The Court said:

> "Let me say parenthetically, before we do that, there is a clear indication in the mind of the Court on this question of frustration, and the Court had entertained that throughout the case, that the question of the option was not necessarily correlated, insofar as condemnation was concerned, with the question of the leasehold estate. The question of the leasehold estate, I think, clearly was a matter that was subject to evaluation and award in this condemnation proceeding.
>
> There is nothing in Judge Yankwich's ruling that is counter to that conclusion, in my judgment. There

is not anything in the ruling, either on pretrial by Judge Yankwich or during the rulings on evidence by the trial judge, or during the discussions with counsel in the absence of the jury, at the bench, but what indicates that it was clearly in the mind of the Court that if there be any question of frustration, that we were not in the proper forum in which to ascertain that feature of the case." [R. 1431-1432.]

* * * * * * * *

"In signing this judgment, there appears to be a statement in the judgment that is at variance with the mind of the Court, and was at the time the judgment on the verdict was signed. I will call attention to that.

I want it also noted that the proposed judgment does not appear to have been endorsed by any of counsel for Tavares Construction Company interests." [R. 1435.]

* * * * * * * *

"The Court inadvertently and without any intent to do so signed the judgment with the word 'option' in there, in that portion of the judgment.

I think it is clear that the trial court, while following what it conceived to be, and what appeared to it was, the ruling on pretrial, it did not enable this Court in condemnation to fix a value for what may or may not have been the frustration of an option right of the Tavares Construction Company interests. It was and is this Court's view that there should be no feature of this case that would prevent the interested parties, if any, from litigating as to what this Court conceives and did throughout the trial conceive to be the proper forum." [R. 1437.]

* * * * * * * *

"The matter is how to reach it without, at least seemingly, being contumacious as far as the Court of Appeals is concerned. I do not want the Court of Appeals to feel in any way that this Court, after an appeal had been taken, would feel as though it has jurisdiction in the sense of deciding something differently from what it has always decided.

This Court's mind has always been centered on the fact that if there was any frustration of this contract it was not a compensable item in an eminent domain case. The deadline occurred on December 23, 1944, and that deadline was occasioned by the activity of the Government in taking over the leasehold. The question is if this is of an equitable character that could be reached in the Court of Claims on the theory of frustration of a contract. That, of course, is not one of those items that could be properly evaluated in an eminent domain proceeding." [R. 1438.]

* * * * * * * *

"The Court: I do not want to do this: I do not want either the litigants or any reviewing authority, or any other applicable judicial authority, to get the impression that this Court is changing its mind in the case or that it has any doubt but what it gave to the jury the law of the case in its instructions. I think I have shown that by the excerpts that have been read, and there are others that will substantiate that. There is nothing I have found that would operate to remove that impression. That was never in the mind of this Court, that any question of frustration of contract was litigated and terminated and adjudicated in this action of eminent domain." [R. 1440.]

The judgment was in error in including the option, as the case had been in fact tried on the theory that the option was not included, no evidence was received for the

purpose of awarding compensation for the option, and there was nothing upon which the jury could evaluate the option. The jury were instructed to make their award the market value of the leasehold estate [R. 1294].

The Court had by the very terms of the judgment, paragraph 14 thereof, specifically retained jurisdiction for the purpose of making such further orders, judgments and decrees as may be necessary in the premises [R. 328].

All that the Court did was to make the judgment speak the truth. The judgment said something which the Court said was erroneous and which he did not intend to say, and which he inadvertently signed. The Court corrected this error.

The Court also had jurisdiction to correct this error under either Rule 60 of the Federal Rules of Civil Procedure, if applicable, or if not applicable, then under Sec. 473 of the California Code of Civil Procedure. Since an appeal had been taken, it in any event had jurisdiction under Rules 75(h) and 81(7) of the Federal Rules of Civil Procedure. Rule 81(7) makes the Federal Rules applicable to proceedings on appeal in condemnation cases and Rule 75(h) authorized the Court to make this correction, since an appeal had been taken.

As we have hereinbefore pointed out in other portions of this brief, the Court created no disparity between the issues tried and the judgment by correcting the judgment. The correction merely eliminated the disparity between the issues tried and the judgment which existed before the correction was made.

Certainly this Appellate Court is not going to enforce a judgment which the Trial Court says it signed through inadvertence and which was not the Court's judgment.

Conclusion.

We respectfully submit that the Appeal of Tavares Construction Company, Inc. *et al.*, should be allowed, the Cross-Appeal of the United States should be denied, and the case should be remanded to the District Court for a retrial, together with appropriate instructions to award compensation for both the leasehold estate and the option rights to the same extent as if the action were in the Court of Claims.

Respectfully submitted,

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